The Bakery, Incorporated *and* American Federation of Grain Millers, AFL-CIO, Local 58. Case 8-CA-14856-2

December 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 15, 1981, an amended charge filed on June 4, 1981, and a second amended charge filed on June 25, 1981, by American Federation of Grain Millers, AFL-CIO, Local 58, herein called the Union, and duly served on The Bakery, Incorporated, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on June 29, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 23, 1981, following a Board election in Case 8-RC-12270,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about May 11, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so, and in addition has refused and continues to date to refuse, as requested by the Union, to provide the Union with information necessary for collective bargaining. On July 10, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and a Cross-Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, its response to the Notice To Show Cause, and its Cross-Motion for Summary Judgment, Respondent admits its refusal to bargain with the Union and to supply the Union with the requested information. Respondent denies, however, that it thereby violated Section 8(a)(5) and (1) of the Act, arguing that the election held on November 13, 1980, should have been set aside for the reasons set forth in its exceptions to the Regional Director's Report on Objections to Election. Respondent also asserts that, since the Regional Director did not conduct a hearing on Respondent's objections to the election, all affidavits referred to and relied on in his Report on Objections should be included in and made part of the record in Case 8-RC-12270.

Review of the record herein, including the record in Case 8-RC-12270, shows that on November 13, 1980, an election was held pursuant to a Stipulation for Certification Upon Consent Election in which a majority of the unit employees designated the Union as their representative for purposes of collective bargaining. Thereafter, Respondent filed timely objections to the conduct of the election alleging, *inter alia*, that the Petitioner engaged in improper preelection offers to waive its initiation fee for any employee who joined the Petitioner prior to the election and that such conduct interfered with the holding of a free election. The objections were overruled in their entirety by the Regional Director in his Report on Objections, issued December 12, 1980. In so doing, the Regional Director stated that the only evidence that was presented concerning an objectionable waiver of initiation fees under *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1975), was the testimony of an employee witness that she believed she had been told by another employee that the waiver was contingent upon signing a union membership card prior to the election. The Regional Director found there was no evidence that the employee alleged to have made the statement was acting as an agent of the Petitioner and he concluded that such a statement by one employee to another employee would

[1] Official notice is taken of the record in the representation proceeding, Case 8-RC-12270, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

not constitute grounds for setting aside the election. Thereafter, Respondent filed with the Board its exceptions to the Regional Director's Report on Objections, essentially reiterating the allegations and contentions set forth in its objections and citing additional authority in support thereof. In addition, Respondent contended that, if the election were not set aside, the Board should order a hearing on the issues raised by its objections. On March 23, 1981, the Board issued its Decision and Certification of Representative[2] in which it adopted the Regional Director's findings and recommendations and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit. In so doing, the Board found that the exceptions raised no issues requiring a hearing.

By letter dated April 29, 1981, the Union requested a meeting with Respondent to negotiate a collective-bargaining agreement and also requested certain information for purposes of collective bargaining.[3] By letter dated May 11, 1981, Respondent refused, and to date is continuing to refuse, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and to furnish the Union with information requested by it for purposes of collective bargaining.

In opposing the General Counsel's Motion for Summary Judgment, Respondent contends that the affidavits and other materials relied on by the Regional Director in his Report on Objections should have been forwarded to the Board as part of the record in Case 8-RC-12270 and that the failure to do so renders the certification invalid. In support of this position, Respondent relies on decisions by various courts of appeals, including the Sixth Circuit's decision in *N.L.R.B.* v. *North Electric Company, Plant No. 10*, 644 F.2d 580 (1981).[4] However, in two recent cases[5] the Sixth Circuit has recognized that "Congress has entrusted to the Board considerable latitude in resolving disputes concerning representation . . ." and has declared that the "Court should be wary of reversing the Board on procedural irregularities absent evidence of prejudice." Specifically, the Sixth Circuit has reaffirmed the position taken in *N.L.R.B.* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 178 (6th Cir. 1967), cert. denied 398 U.S. 958, in which the court said:

> To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof.

Respondent has failed to meet the criteria set out by the court in Tennessee Packers. Thus, in its brief in opposition to the General Counsel's Motion for Summary Judgment, it failed to provide offers of proof to support findings contrary to those of the Regional Director. Consequently, we find that Respondent has failed to raise substantial and material issues that would require reconsideration of our decision in Case 8-RC-12270.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[7]

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[2] Not reported in volumes of Board Decisions.

[3] The information which the Union sought included the wages paid each employee, the classification of each employee, the hospitalization, life insurance, sickness and accident benefits, and any other benefits provided to employees and cost-of-living data.

[4] On October 5, 1981, Respondent filed a motion to take administrative notice of recently effective changes in the Board's Rules and Regulations. In its motion, Respondent directs the Board to the revisions to Sec. 102.69(g) of the Board's Rules and Regulations, Series 8, as amended, which appeared in the September 15, 1981, Federal Register (29 CFR 102; 46 F.R. 45922, *et seq.*) In response to Respondent's motion, on October 15, 1981, the General Counsel filed a cross-motion in which counsel for the General Counsel also moves the Board to take administrative notice of the revisions to the Rules and Regulations. Both Respondent's and the General Counsel's motions are granted to the extent they ask the Board to take administrative notice of the revisions to Sec. 102.69(g) of the Board's Rules and Regulations which appeared in the September 15, 1981, Federal Register; however, we reject Respondent's argument that these revisions are an admission by the Board that former Sec. 102.69(g) required the transmittal to the Board of statements of witnesses as part of the representation case underlying the proceeding herein. Rather we agree with the General Counsel's assertion that the supplementary information published with the revisions makes clear that in no-hearing cases "witnesses' statements always have been and 'still are' excluded from the record." Thus, the revisions support our finding that the full record in the underlying representation case was forwarded to the Board.

[5] *Reichart Furniture Co.* v. *N.L.R.B.*, 598 F.2d 66 (6th Cir. 1981); *Revco D.C., Inc., and/or White Cross Stores, Inc. No. 14* v. *N.L.R.B.*, 653 F.2d 264 (1981).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] In light of our decision to grant the General Counsel's Motion for Summary Judgment, Respondent's Cross-Motion for Summary Judgment is hereby denied.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is located at 4063 Fitch Road, Toledo, Ohio, where it is engaged in the operation of a bakery. Annually, in the course of its business, Respondent receives goods valued in excess of $50,000 directly from points located outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

American Federation of Grain Millers, AFL–CIO, Local 58, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

2. The certification

On November 13, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 23, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 29, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. In addition, since on or about April 29, 1981, the Union by letter, has requested the Respondent to provide information including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided by Respondent to its employees. This information is necessary for the Union's performance of its function as the exclusive bargaining representative of the unit employees. Commencing on or about May 11, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 11, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that Respondent has since that date and at all times thereafter refused to supply information requested by the Union, which information is necessary for collective bargaining. We find, that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order Respondent to supply the information necessary for collective bargaining requested by the Union.[8]

[8] See *Dynamic Machine Co.*, 221 NLRB 1140 (1975).

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Bakery, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Grain Millers, AFL-CIO, Local 58, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 23, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 11, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about May 11, 1981, to supply information requested by the Union including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided by the Respondent to employees, which information is necessary for collective bargaining, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Bakery, Incorporated, Toledo, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL-CIO, Local 58, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to provide the above-named labor organization with information requested by it for purposes of collective-bargaining including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, provide the above-named labor organizaton with information requested by it for the purpose of collective bargaining, including wages, classifications, hospitalization benefits, life

insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to its employees.

(c) Post at its Toledo, Ohio, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL-CIO, Local 58, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the below-described information requested by the Union which is relevant to and necessary for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production employees, maintenance employees, and packing employees employed by the Employer at its 4063 Fitch Road facility in Toledo, Ohio, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with information requested by it for the purpose of collective bargaining, including wages, classifications, hospitalization benefits, life insurance, sickness and accident benefits, cost-of-living data, and information on any other benefits provided to our employees.

THE BAKERY, INCORPORATED